

Doc 4925

MEMORANDUM

JUNE 25, 1987

TO: BOSTON REDEVELOPMENT AUTHORITY AND
STEPHEN COYLE, DIRECTOR

FROM: KEVIN J. MORRISON, DEPUTY GENERAL COUNSEL
DANIEL J. BARRY, ASSISTANT LAND USE COUNSEL

SUBJECT: APPLICABILITY OF ARTICLES 26, 26A, AND 26B TO
RENOVATION OF 451 D STREET, SOUTH BOSTON, BY D STREET
451 LIMITED PARTNERSHIP, PETITION Z-9862

EXECUTIVE

SUMMARY: This project involves property in South Boston which the owner seeks to convert from primarily industrial uses to primarily commercial uses. The project requires a variance from the off-street parking provisions of the Zoning Code, although the owner argues that it is exempted from this requirement. Because the variance is required, the project is a "substantial rehabilitation" subject to the linkage provisions of the Zoning Code.

At issue in this case is property located at 451 D Street in South Boston, consisting of a 61,666 square foot lot improved by a 9-story brick building. The building contains a total of 453,852 square feet, or 50,428 square feet per floor. The parcel is located in an M-4 zone in which the allowed uses include most retail, service, and office uses, as well as industrial and manufacturing uses. The property is currently used in the following manner: 80% warehouse and 20% office.

The owner of the property, D Street 451 Limited Partnership, is seeking a change of use permit which would allow the percentages of the uses to change from 80% warehouse and 20% office to 20% warehouse and 80% office. The property owner originally sought to meet the off-street parking obligation generated by this change of use by constructing a parking garage on property it owns directly across the street at 69-75 Fargo Street. After receiving substantial opposition from the community and the city, the property owner is now seeking a variance from the applicable off-street parking requirements of the Boston Zoning Code (the "Code").

On April 23, this Board voted to recommend that the Board of Appeal defer the owner's application for a variance until the Authority was able to determine whether the proposed change of use was a Development Impact Project ("DIP"). On May 5, 1987, the Board of Appeal voted to defer consideration of the application until May 26, 1987, as requested. At the further request of the property owner's attorney, on May 21, 1987, the Board Memorandum submitted on that date was withdrawn and on May 26, 1987, the Board of Appeal voted to defer again the consideration of the variance issue until its meeting on July 7, 1987.

The pertinent legal issues are the following:

A. Does the project require a variance?

Article 23 of the Code sets forth provisions regulating off-street parking requirements for various uses, with Section 23-4 applicable to office uses. Where a property owner changes the use of a building, it must meet the provisions of the Code applicable to the new use. Boston Zoning Code, §4-1. If a property owner fails to meet the zoning provisions applicable to the new use, no change of use permit may issue. Id. §4-3.

The Inspectional Services Department ("ISD") has determined that the owner of the 451 D Street property did not meet the off-street parking requirements contained in the Code for office uses. Therefore, the property owner must obtain a variance from the requirements of Section 23-4 in order to obtain his change of use permit.

B. Is the proposed project subject to the "linkage provisions"?

A rehabilitation project is subject to linkage if it requires substantial rehabilitation. The original linkage amendment, Article 26, has been superseded by Articles 26A and 26B, except that the shortened payment period provided in Article 26A applies only within the downtown area. Boston Zoning Code, §26A-4. Otherwise, Articles 26A and 26B fully supersede Article 26. Id., §26A-3(4), See also, Boston Zoning Code, §26A-2(1).

According to Section 26A-2(4), a substantial rehabilitation is one in which the rehabilitation costs at least 50% of the physical value of the project. The physical value of the property is the assessed value on January 1st preceding an owner's application for DIP Plan approval. Id., §26A-2(4). In this case, no DIP Plan has been submitted, so the appropriate measure of physical value is the assessed value on January 1st preceding the issuance of the first permit relative to the proposed change of use. That permit issued in February, 1986, so the relative assessed value is that value existing on January 1, 1986. The assessed value on that date was \$7,925,500.

While there is no twelve month limit on the aggregation of rehabilitation expenses for determining whether a project constitutes a substantial rehabilitation for Article 26A purposes, there is a reasonable limit on such aggregation. The only reasonable interpretation of this provision is one which limits aggregation to those expenses incurred on a discrete project. In this case, the discrete project is the change in use of the premises from primarily manufacturing to primarily office; consequently, all expenses incurred for this change of use must be aggregated for Article 26A purposes. This aggregation must include all rehabilitation expenses incurred, including expenses incurred for build-out of tenants' space.

Based on estimates provided by the developer to ISD, the total cost of rehabilitation thus far totals \$5,189,250, with approximately 25% of the space to be converted included in this total. Although the property owner's attorney argues that the figures provided to ISD were excessive, it is reasonable for the BRA to rely on those figures. No permits for the property owner's change of use should have issued prior to a determination as to whether the proposed project was subject to linkage. Had this procedure been followed, the linkage determination would have been based on the estimated cost of the rehabilitation. This is exactly what is being done in this case.

Building permits indicate that build out of tenant space will cost at least \$35 per square foot, or an additional amount in excess of \$7.8 million. However, based only upon the building permits already issued thus far, the project qualifies for linkage under Article 26A, as follows:

Total Estimated Cost:	<u>\$5,189,250</u>	= .654 = 65.4%
Assessed Valuation (FY'87):	\$7,925,500	

Because the rehabilitation expenditures, based upon the building permits issued, exceed 50% of physical value according to the assessed valuation for fiscal year '87, the project is subject to Article 26A linkage.

Similarly, the project is subject to Article 26B linkage as well. The sole difference between Article 26A and Article 26B is with regard to the definition of "substantially rehabilitate". In Article 26B, the definition limits aggregation of rehabilitation expenses to those incurred in any 12 month period. However, the distinction makes no difference in this case, because all but \$7,500 of the \$5,189,250 total was for the 12 month period ending March 6, 1987. Consequently, the project is subject to Article 26B linkage as well.

Estimated "linkage" payments are as follows:

Existing Office Space	50,000 sq. ft.
Proposed Office Space	<u>363,000 sq. ft.</u>
Office Space Subject to Linkage	313,000 sq. ft.
Linkage Payments (@ \$6/sq. ft.)	\$1,878,000

Copies of correspondence to and from the counsel for D Street 451 Limited Partnership are attached for referenced (Attachment Nos. 1, 2, 3, 4 and 5). A map indicating the location of the project is also attached (Attachment No. 6).

Recommended votes follow:

VOTED: In reference to petition Z-9862, D Street 451 Limited Partnership ("Appellant"), 451 D Street, South Boston, for variance from off-street parking requirements for change of use from 80% warehouse/20% office to 80% office/20% warehouse in a manufacturing (M-4) district, the Boston Redevelopment Authority finds that based upon information submitted by the Appellant the proposed change of use project is a substantial rehabilitation under Articles 26, 26A and 26B of the Boston Zoning Code, and

VOTED: In reference to petition Z-9862, D Street 451 Limited Partnership ("Appellant"), 451 D Street, South Boston, for variance from off-street parking requirements for change of use from 80% warehouse/20% office to 80% office/20% warehouse in a manufacturing (M-4) district, the Boston Redevelopment Authority recommends denial until such time as the Authority approves a Development Impact Project Plan for such change of use and until such time as the Appellant enters into an agreement with the Authority regarding a Development Impact Project Contribution in accordance with Articles 26, 26A, and 26B of the Boston Zoning Code.

SHADRAWY & RABINOVITZ

A PROFESSIONAL ASSOCIATION
OF
ATTORNEYS AT LAW

Attachment No. 1

BERNARD F. SHADRAWY, P.C.
BERNARD F. SHADRAWY, JR., P.C.
EDWARD RABINOVITZ
ROBERT E. BROOKS

15 BROAD STREET
BOSTON, MASSACHUSETTS 02109-3803
(617) 523-3333

April 27, 1987

BY MESSENGER

Robert F. McNeil, Esquire
General Counsel
Boston Redevelopment Authority
Ninth Floor
Boston City Hall
Boston, MA 02201

Re: 451 D Street

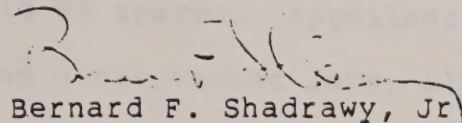
Dear Mr. McNeil:

It is our understanding that you have requested a memorandum relative to whether or not the work being performed on the building located at 451 D Street brings it within the scope of Articles 26A and 26B, concerning Development Impact Projects.

I have prepared the enclosed memorandum that outlines our position in this matter. We do not believe that there is any merit to the position that 451 D Street should be designated under these articles.

We would be happy to meet with you or your staff if any additional information is required.

Very truly yours,


Bernard F. Shadrawy, Jr.

BFSJr/a
enclosure

DEVELOPMENT IMPACT PROJECT JURISDICTION

MEMORANDUM

451 D STREET, BOSTON, MA

FACTS:

The property located at 451 D St. in South Boston consists of a 61,666 square foot lot that is improved by a 9 story brick building with each floor containing 50,428 square feet for a total of 453,852 square feet of building area. The building was constructed at the turn of the century and has traditionally been used for warehouse purposes. The legal occupancy for the building permits offices, light manufacturing, wholesale business, warehouse and a photo process lab.

The subject building is located in an area made up of office and warehouse buildings and vacant lots. There currently exists ample off street parking as well as many open lots offered for daily parking.

The owner also owns a vacant lot directly across Fargo Street which lot contains 21,775 square feet and is currently used for parking of tenants located in subject premises. The current lot would handle 59 spaces of unattended parking and could easily, with an attendant, handle many more than said 59 spaces. Appellant under a tenancy-at-will basis, is also leasing other vacant land, also across Fargo Street for the subject building from the Mass. Port Authority, which is also used as parking of tenants located in the subject premises.

This variance is being sought only after the owner has

In November of 1983 the property was purchased by the current owner, together with the vacant parcels. The owners maintained the existing uses in the building which in July of 1986 consisted of approximately 89% warehouse and 11% office for occupied space which use is virtually unchanged today.

The building when purchased had substantial vacancies and, the owners embarked upon a program to make minor changes in order to conform the building to current fire and safety codes and to rent out the vacant space. The owners sought city approval of a change in the occupancy mix to achieve a balance between the warehouse and office uses of the building. To that end the owners sought and were granted building permits. Construction pursuant to those permits was begun in March of 1986. Since the building was constructed prior to 1964, it is in our opinion, "pre-Code" and we therefore do not agree that the building is subject to the requirements of the Code relative to parking (see Chapter 665 of the Acts of 1956, Section 23-7A).

At the insistence of the Inspectional Services Department, the owners are currently seeking a variance from the Boston Zoning Code, Section 23-4 relative to having insufficient off street parking facilities being provided for the subject building.

This variance is being sought only after the owner had attempted to build a four story parking garage across Fargo Street from the subject building under a previous appeal, which would have allowed the owner to meet the required off street parking requirement as stated in Section 23-4 of the Code, but would have required a variance due to violation of floor area ratio and use of the premises, after receiving very strong and convincing resistance from the community, City officials and City departments and agencies, to the construction of said parking garage, the owner agreed with said parties to request from the Board the current proposed variance from said parking requirement in order to satisfy the Inspectional Services Department's requirement for parking which the owner believes is not required.

The assessed value for the property for fiscal 1987 is \$7,925,000 (this value is far below the true physical value of the property and does not take into consideration the value increases caused by work done on the property pursuant to the building permits issues).

The total amount expended by the owner due to alterations or repairs made to the building within the 12 month period March 2, 1986 through March 1, 1987 totaled \$3,190,250. Additionally permits have been obtained on behalf of various tenants to conform their space to their needs (not included in the figures above).

Furthermore, contained in the \$3,190,250 figure are items that should not be considered alterations or repairs. These are items including fire and safety that would have to be done whether or not any further work was to be performed. Those items include:

Fire Protection	\$187,500
Plumbing (fire pumps etc.)	216,000
Roof	95,000
Total	<u>\$498,500</u>

Therefore, the actual alteration and repair work totaled \$2,691,750.

ISSUES:

The issues to be resolved whether or not the work performed in building to allow the change in occupancy mix brings the building within the scope of Articles 26, 26A and 26B of the Boston Zoning Code relative to Development Impact Projects are:

- 1) Is a variance from the Boston Zoning Code relative to parking necessary in view of the pre-Code status of the building?
- 2) Is the subject appeal to the Boston Zoning Appeal Board the type of appeal that would bring a building under the jurisdiction of Article 26?
- 3) What costs are includable in calculating qualification for Development Impact Projects, and do they qualify as a substantial rehabilitation?
- 4) Is the work performed within the scope of projects intended for inclusion in the "linkage programs"?

ARGUMENT

A VARIANCE FROM THE BOSTON ZONING CODE IS NOT NECESSARY AND THE WORK PERFORMED IS NOT SUBJECT TO ARTICLES 26, 26A AND 26B.

In Articles 26, 26A and 26B Development Impact Projects are defined:

"Development Impact Project", any development in the City in which it is proposed to erect a structure or structures having a total gross floor area (exclusive of all accessory parking garage space) in excess of one hundred thousand (100,000) square feet or to enlarge or extend a structure or structures so as to increase its (or their) gross floor area (exclusive of all accessory parking garage space) by more than one hundred thousand (100,000) square feet or to substantially rehabilitate a structure or structures having, or to have, after rehabilitation, a gross floor area (exclusive of all accessory parking garage space) of more than one hundred thousand (100,000) square feet; which structure or structures is (are) intended for a use for which the use item number is listed in Table D. Section 26A-3(2)(a), or, for a use for which the use item number is not listed if such Project will directly result in a reduction in the supply of low and moderate income dwelling units as determined by the Boston Redevelopment Authority ("Authority") and which Project requires a variance, conditional use permit, exception, or zoning map or text amendment."

To be included, any work performed must "require a variance, conditional use permit, exception, or zoning map amendment". In this case the owners have sought a variance relative to parking requirements. In fact, we should not be required to seek a variance.

Our analysis of the parking requirements of the City of Boston Zoning Code, Chapter 665 of the Acts of 1956 as amended (hereinafter Code) for the subject property is based upon Article 23-7A of the Code which states:

"If a structure existing on December 31, 1964 is altered or extended so as to increase its gross floor area or the number of dwelling units, only the additional gross floor area or the additional number of dwelling units shall be counted in computing the off street parking facilities required."

The subject building was constructed and occupied well prior to December 31, 1964 and is not having its gross floor area increased under any theory. Therefore, under the above quoted article, it is clear from the written words that the subject building does not fall under the proviso or requirement for off street parking and therefore the subject building is in compliance as is.

The owners had sought to fulfill parking requirements that Inspectional Services stated were necessary by the construction of a parking facility on a nearby lot. The community opposed the garage and, despite our belief that a variance was not necessary, the owners sought relief from the Code relative to parking requirements.

In fact, a variance is not required and this project does not fulfill the explicit terms of Articles 26, 26A and 26B wherein variances, etc. are required. Additionally, the variance sought by the owners before the Board of Appeal is technical in nature, in that it deals with parking requirements. It is not a variance seeking to increase the floor area ratio or extend the building over open space. The variance sought is not the type that was contemplated by the drafters of the linkage amendment.

THE WORK PERFORMED IS NOT A SUBSTANTIAL REHABILITATION.

The definition of Development Impact Project as set forth above requires that a structure be erected, enlarged or extended or substantially rehabilitated. Since the building has not been newly erected nor enlarged or extended, a review of the meaning of substantially rehabilitated must be made. The definition contained in the Articles is set forth as follows:

"Substantially rehabilitate", to cause alterations or repairs to be made, to a structure of structures, costing in excess of fifty percent (50%) of the physical value of the structure or structures. Physical value of a structure of structures shall be based on the assessed value as recorded on the assessment rolls of the City as of the January 1 preceding the date of the application for Development Impact Project Plan approval.

As stated in the facts, the owner has caused work to be done in the total amount of \$3,190,250. Included in that figure are permits taken out to maintain fire safety and to replace the roof in a total amount of \$498,500 leaving the total spent by the owner for non-maintenance and non-tenant work of \$2,691,750.

This figure is far less than 50% of the assessment for fiscal 1987 of \$7,925,000 or \$3,962,500. Moreover, the assessed value for the property is lower than the value of the property due to the time lag in the Assessing Department's value which reflects a value of \$17.46 per square foot. A more realistic value for 1987 would be in the area of \$22.00 per square foot or \$11,000,000. The improvements made total approximately \$5.90 per foot for the building which is not a significant amount, particularly in view of the exaction payments which would total \$6.00 per foot if this project met the requirements for inclusion as a Development Impact Project. Therefore, the DIP payment would be more than the cost of the work performed.

THE WORK PERFORMED AT 451 D STREET DOES NOT FALL WITHIN THE PURPOSE CLAUSES OF ARTICLES 26A AND 26B.

The drafters of the so called "linkage" amendments did not intend to include limited projects of this type. Those purpose clauses are set forth as follows:

DEVELOPMENT IMPACT PROJECTS - HOUSING

SECTION 26A-1. Statement of Purpose. The purpose of this article is to promote the public health, safety, convenience and welfare; to prevent overcrowding and deterioration of existing housing; to preserve and increase the City's housing stock; to establish a balance between new, large-scale real estate development and the housing needs of the City; and to mitigate the impacts of large-scale development on the available supply of low and moderate income housing, by provisions designed to:

1. Afford review and regulation of large-scale real estate development projects which directly or indirectly displace low or moderate income residents from housing units or contribute to an increase in the costs of housing.
2. Increase the availability of low and moderate income housing by requiring developers, as a condition of the grant of deviations from the Zoning Code or the grant of an amendment to the zoning map or text, to create low and moderate income housing or to make a housing contribution grant to the Neighborhood Housing Trust ("Trust").

DEVELOPMENT IMPACT PROJECTS - JOB TRAINING

SECTION 26B-1. Statement of Purpose.

The purpose of this article is to promote the public health, safety, convenience and welfare and to mitigate the adverse impacts of new large-scale real estate development projects on existing development by providing for job training for low and moderate income people. In particular, the owners of new commercial uses, which are more capital intensive and less land intensive than industrial uses, can pay more for land than owners of manufacturing uses; therefore these uses directly result in higher land costs and indirectly cause further land price increases by increasing housing demand. Workers will therefore need to be trained so that they will have the job skills necessary to compete for these new jobs. This Article is designed to:

1. Afford review and to regulate large-scale real estate development projects which result in the creation of new jobs, requiring the creation of new job training programs or the expansion of existing ones.

2. Increase the opportunities for job training for low and moderate income people by requiring developers, as a condition of the grant of deviations from the Zoning Code or the grant of an amendment to the zoning map or text, to make a development impact payment to the Neighborhood Jobs Trust.

Both statements make reference to large-scale real estate developments.

The work being performed at 451D Street should not be included as a Development Impact Project. In fact, it is not a large-scale real estate development project. The renovations consist of mechanical, system, and structural improvements that do not change the nature of the building but rather allow for a change in the balance of the mixed uses that historically and currently have occurred in the building. There has been no displacement or traumatic upheavals caused by the work done to the building. The project permits the use of a building that had experienced limited functional obsolescence. To include projects of this type within the scope of Development Impact Projects will discourage the maintenance of older functional building which need upgrading to preserve their structural and economic viability.

The assessment of linkage funds to projects of this limited scope was not the intent of the drafters of Article 26 and subsequently enacted Article 26A and 26B. The development of a major office structure with development costs of \$100 per square foot are not impacted by an exaction of \$5.00 per foot. The amount spent on 451 D Street and kindred structures will be impacted and discouraged when the expenditure of \$5.90 per foot will result in an exaction payment of \$5.00 per foot for housing and \$1.00 for jobs.

CONCLUSION

The work being performed at 451 D Street does not fall within the scope of a Development Impact Project. The work being performed does not need a variance, and a variance was sought over the owner's objection only at the behest of the Inspectional Services Department.

The work being performed facilitates a change in the occupancy mix of the building. It is not a substantial rehabilitation in concept and is not a large-scale real estate development. The work being performed does not total a sufficient amount under the definition contained in Articles 26A and 26B, and the amount of the work performed to repair and alter should not include the work performed in furtherance of the safety of the building or the integrity of the roof.

The amounts expended nonetheless do not equal 50% of the value of the building, whether or not the low value placed by the assessors is used.

To the best of our knowledge, no other older buildings being upgraded have been designated as Development Impact Projects. Renovations of this type were not intended to be within the scope of the "linkage" articles. It would be a mistake for the Boston Redevelopment Authority to include a project of this nature within the scope of linkage. The relative cost of exaction payments to renovation costs would be a fatal disincentive to the preservation of structures of this type.

For all these reasons the Boston Redevelopment Authority should not designate the work being performed at 451 D Street as subject to the requirements of a Development Impact Project.

Respectfully Submitted

SHADRAWY & RABINOVITZ

Bernard F. Shadrawy, Jr.
Attorney for
D Street 451 Limited Partnership

Dear Mr. Shadrawy:

Re: 451 D Street

For the purpose of preparing a recommendation for the next meeting of the Authority's Board scheduled for May 11, I am sending this letter to outline our position at this time in connection with the project at 451 D Street in South Boston. Based upon a review of the Boston Zoning Code and your previously submitted recommendations of April 17, and to request certain additional information regarding that project. I ask that the information requested below be submitted as soon as possible in order to allow the Board to be fully informed.

LEGAL ISSUES:

A. Applicability of Boston Zoning Code Section 12-1A

Although the Board of Appeal has requested from the City Law Department an advisory opinion on the applicability and effect of Section 12-1A, it is presently our position that this section does not apply to the proposed change of use. We believe that the proposed change of use requires a Variance from the off-street parking requirements of the Zoning Code, and therefore that the project is a Development Impact Project in accordance with Section 12-1A of the code.

Section 12-1A reads, in relevant part:

-11-

...a structure which is an extension of the existing structure, and which is located on the same lot as the existing structure, shall be subject to the off-street parking requirements of the Zoning Code, and shall be subject to the requirements of the Development Impact Project in accordance with Section 12-1A of the code.

BOSTON
REDEVELOPMENT
AUTHORITY

Raymond L. Flynn
Mayor

Stephen Coyle
Director

One City Hall Square
Boston, MA 02201
(7) 722-4300

Attachment No. 2

Delivery by Hand

May 15, 1987

Bernard F. Shadrawy, Jr., Esq.
Shadrawy & Robinovitz
15 Broad Street
Boston, MA 02109-3803

Dear Mr. Shadrawy:

Re: 451 D Street

For the purpose of preparing a recommendation for the next meeting of the Authority's Board scheduled for May 21, I am sending this letter to outline our position at this time in connection with the project at 451 D Street in South Boston, based upon a review of the Boston Zoning Code and your previously submitted memorandum of April 27, and to request certain additional information regarding this project. I ask that the information requested below be submitted as soon as possible in order to allow the Board to be fully informed.

LEGAL ISSUES:

A. Applicability of Boston Zoning Code Section 23-7A

Although the Board of Appeal has requested from the City Law Department an advisory opinion on the applicability and effect of Section 23-7A, it is presently our position that this section does not apply to the proposed change of use. We believe that the proposed change of use requires a variance from the off-street parking requirements of the Zoning Code, and therefore may qualify as a Development Impact Project in accordance with Sections 26A and 26B of the code.

Section 23-7A reads, in relevant part:

"If a structure existing on December 31, 1964, is altered or extended so as to increase its gross floor area or the number of dwelling units, only the additional gross floor area or the additional number of dwelling units shall be counted in computing the off-street parking facilities required." (emphasis added)



"If a structure existing on December 31, 1964, is altered or extended so as to increase its gross floor area or the number of dwelling units, only the additional gross floor area or the additional number of dwelling units shall be counted in computing the off-street parking facilities required; provided that the use remains in the same category according to sub-headings in Table A of Section 8-7 and that for the purposes of this section, Use Items No. 1 through 7 are considered to be in the same category." (proposed amendment underlined)

The only change which the proposed amendment would make is with regard to alterations or extensions which increase the gross floor area or increase the number of dwelling units. Specifically, the amendment would exempt such projects only if the use remained within the same category both before and after the alteration or extension. As the section now stands, it is not clear whether an alteration or extension in conjunction with a change of use is exempt thereunder. What is clear is that Section 23-7A, as it is presently written or as it is proposed to be amended, does not apply to the project at issue, as there is no extension of gross floor area of the property.

B. Definition of "Substantially Rehabilitate" in Article 26A

In your memorandum of April 27, you allege that "[t]he total amount expended by the owner due to alterations or repairs made to the building within the twelve month period, March 2, 1986 through March 1, 1987, totaled \$3,190,250." However, the relevant period for which rehabilitation expenses are to be aggregated under Article 26A is not limited to a twelve month period. The definition of "[s]ubstantially rehabilitate" in Article 26A reads, in relevant part: "...to cause alterations or repairs to be made, to a structure or structures, costing in excess of fifty percent (50%) of the physical value of the structure or structures." Unlike Article 26B, there is no twelve month limitation on aggregation of rehabilitation expenses.

Even as to Article 26B, there is a question as to which twelve month period contains the greatest amount or percentage of expenditures in relation to assessed value of the property. It is even possible, depending on your client's rehabilitation schedule, that the greatest amount of rehabilitation expenses will be incurred within a twelve month period which lies at least partly in the future. The definition in Article 26B provides that rehabilitation expenditures in excess of 50% of assessed value in any twelve month period renders a project a substantial rehabilitation.

C. Rehabilitation Costs which are included for purposes of determining whether a project is a substantial rehabilitation.

Also in your memorandum of April 27 and at the Board of Appeal hearing on May 5, you indicated that certain safety work performed by the property owner should not be included in the total expenses upon which is based the determination of a substantial rehabilitation. The definition of "[s]ubstantially rehabilitate" in Article 26A contains no such exclusions, and it specifically includes "alterations or repairs...to a structure...." We believe that this definition includes all rehabilitation expenditures, including those incurred for safety purposes, as there is no express or implied exclusion in either Article 26A or Article 26B.

The underlined conditional clause at the beginning of the section limits the applicability of the same. This conditional clause may be interpreted in only one way: any alteration or extension which does not increase gross floor area or the number of dwelling units is not included in the Section 23-7A exemption from off-street parking requirements. Any other reading of this section would contravene the plain meaning of the words contained in the provision.

Section 4 of the Boston Zoning Enabling Act (c. 665, Acts of 1956) reads:

"A zoning regulation or any amendment thereof shall apply to any change in the use of a building or structure or of land, and to any alteration of a building or structure when the same would amount to reconstruction, extension or structural change, and to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent; but no zoning regulation nor any amendment thereof shall apply to existing buildings or structures, nor to the existing use of any building or structure, or of land to the extent to which it is used at the time of the adoption of such regulation or amendment, except that any such regulation or amendment may regulate non-use of a nonconforming use so as not to unduly prolong the life thereof."

This section requires that a change in use of a structure be subject to zoning regulations, and that exemptions of existing buildings from zoning regulations be limited to existing uses in existing buildings. If we were to accept your argument that a change of use which does not extend the gross floor area is exempt from off-street parking, this would violate this section of the Enabling Act in that it would either allow the creation of a nonconformity where none previously existed or allow the extension of a previously existing nonconformity. Even allowing, for the sake of argument, that the proposed change of use would not violate the provisions of this section of the Zoning Enabling Act, the Zoning Code requires that any extension of a nonconforming use requires a conditional use permit. Boston Zoning Code, Article 9.

If Section 23-7A does not exempt the subject property from the Zoning Code's off-street parking requirements, then the proposed change of use is subject to the off-street parking requirements of Section 23-4 for that portion of the building which will be used for office space. Boston Zoning Code Section 23-7. The portion of building which remains in warehouse use is subject to the parking requirements contained in Section 23-5. Id. As indicated by the Inspectional Services Department, it is the provisions of Section 23-4 from which the project requires a variance.

The proposed technical amendment to the Zoning Code referred to at the May 5th hearing of the Board of Appeal, but not yet enacted by the Zoning Commission, limits Section 23-7A exemptions, but does not affect the interpretation set forth above. As proposed by Zoning Text Amendment 116, Section 23-7A would be amended to read:

REQUEST FOR INFORMATION

In order to make the appropriate recommendation, I request that you send to me the following information, accompanied, where indicated, by documentary evidence. This information will aid the Board in its determination of whether to project is subject to Article 26A or Article 26B, or both.

1. Total amount and date of expenses incurred since the commencement of rehabilitation.
2. Total number of square feet rehabilitated by the amount of expenses included in 1 above.
3. Total amount of expenses incurred performing rehabilitation pursuant to building permits obtained "on behalf of tenants" and not included in \$3,190,250 figure quoted in your April 27 memorandum.
4. Total number of square feet rehabilitated by expenses included in 3.
5. Copies of all building permits obtained since the commencement of rehabilitation, with an indication of building permits "obtained on behalf of tenants," those included in the \$3,190,250 figure included in the April 27 memorandum permits and other building permits.
6. For all rehabilitation activities, indicate and document any divergence between the estimated cost of rehabilitation which appears on the building permit and the actual cost incurred.
7. Indicate the total number of square feet which, respectively, have already been rehabilitated, are currently being rehabilitated, and will in the future be rehabilitated consistent with the change of use permit which is currently at issue.
8. Indicate the total number of square feet which, prior to the grant of any change of use permit, lawfully may be used as office space and warehouse space, respectively.
9. Indicate the percentage of the building's total gross square footage which prior to the grant of any change of use permit, lawfully may be used as office space and warehouse space, respectively.
10. Indicate the total number of square feet which, subsequent to the grant of change of use permit applied for, lawfully may be used as office space and warehouse space, respectively.
11. Indicate the percentage of the building's total gross square footage which, subsequent to the grant of the change of use permit applied for, lawfully may be used as office space and warehouse space, respectively.
12. Indicate for any rehabilitation activities not yet commenced the proposed date of commencement, the proposed date of completion, and the estimated cost of such rehabilitation, the number of square feet which will be rehabilitated, and whether the rehabilitation or use of the rehabilitated

premises subsequent to such rehabilitation will require any zoning relief, i.e., variance, conditional use permit, exception, or zoning map or text amendment.

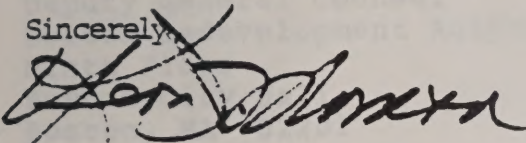
13. Indicate any overvaluation abatements applied for or approved by the Assessing Department for fiscal years 1986 and 1987.

Except for items 6, 12 and 13, the foregoing requests for information are, in reality, requests to clarify or substantiate previous representations.

In conclusion, you may submit further comments relative to the applicability of the various provisions of the Zoning Code as set forth in this letter.

If you have any questions, do not hesitate to call me at 722-4300, Ext. 336.

Sincerely,



Kevin J. Morrison
Deputy General Counsel

cc: Stephen Coyle, Director
Robert E. McNeil, Chief General Counsel

SHADRAWY & RABINOVITZ

Attachment No. 3

A PROFESSIONAL ASSOCIATION
OF
ATTORNEYS AT LAW

BERNARD F. SHADRAWY, P.C.
BERNARD F. SHADRAWY, JR., P.C.
EDWARD RABINOVITZ
ROBERT E. BROOKS

15 BROAD STREET
BOSTON, MASSACHUSETTS 02109-3803

(617) 523-3333

May 20, 1987

BY MESSENGER

Kevin J. Morrison, Esquire
Deputy General Counsel
Boston Redevelopment Authority
Ninth Floor
Boston City Hall
Boston, MA 02201

Re: 451 D Street, Boston, MA

Dear Mr. Morrison:

This letter is written in response to your letter of May 15, 1987 in connection with the above captioned property. Before responding to your request for further information, I would like to address your interpretation of several legal issues that I raised in our memorandum to the Boston Redevelopment Authority.

I completely disagree with your reasoning relative to Section 23-7A of the Boston Zoning Code, and I would point out that the issue is not properly before the BRA, but rather should be decided by the Board of Appeal and which issue will be taken up by that Board in it's meeting on May 26, 1987.

I also disagree with your statement that all items of fire, safety and structural integrity should be included in calculating the amount to be used in determining substantial rehabilitation. The intent of Article 26, 26A and 26B is to include items that are concerned with improving an adequate pre-existing condition as opposed to items concerned with repair and maintenance to preserve the viability of a structure.

I would also point out that Article 26A is not applicable to 451 D Street. That section which supplemented Section 26 has defined geographical limits that do not include this project. Both Section 26 and 26B contain the 12 month limitation. Furthermore, there is a serious question as to whether this project should be included under Article 26 at all in view of the language that limits Article 26 to projects commenced and approved prior to the adoption of 26A and the exclusion of projects applicability for those projects that are not within the geographical boundaries of 26A.

Kevin J. Morrison, Esq.

Page 2

May 20, 1987

The enclosed material should be responsive to your requests numbered 1-6 and part of request #7. The decision as to the prospect of performing any future work on the subject building will depend on the ultimate decision on the issue as to whether this project is subject to Sections 26, 26A, or 26B.

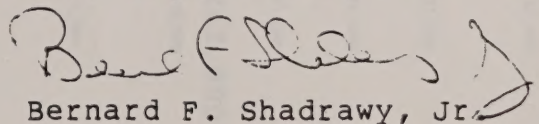
In response to your requests 8-11, it is my position that 100% of the space could lawfully be used either as office or warehouse prior to the request and will remain the same after any grant of change of use. Once again, the issue of the variance does not deal with a non conforming use or uses that were permitted in this M-4 district, but rather with an off street parking requirement that we contend is not applicable to this project.

In response to request #12, I restate my position that any future work will depend on the decision of the BRA Board in this matter, and that future construction jobs as well as the creation of new permanent employment opportunities are dependent on the outcome of the resolution of this issue.

In response to request #13, I submit that applications for abatements have been filed for this parcel and adjacent parcels for 1986 and 1987. There have been discussions with members of the Assessing Department on these applications, but no final decisions have been made on those applications.

The BRA should seriously consider the effect that the extension of the legislation of Development Impact Projects will have on the potential rehabilitation of underutilized structures. I believe that our arguments against including projects of the scope of 451 D Street should be given weight in your recommendation on this matter.

Very truly yours,



Bernard F. Shadrawy, Jr.

BFSJr/a
enclosures

[Copies of building permits enclosed with letter not included]

TENANT RENOVATION

451 D STREET RENOVATION WORK

TENANT SPACE & SQUARE FOOTAGE	DATE PERMIT ISSUED PERMIT #	DATE WORK STARTED	DATE WORK COMPLETED	EST. COST OF WORK	ACTUAL COST OF WORK
Allen Copy (tenant moved) 6,000 S.F.	Feb. 18, 1986 #3484	Feb.	April 1, 1986	\$7,500	\$7,500
Allen Copy Amendment	March 24, 1986 #A363	March 25, 1986	April 1, 1986	\$31,500	\$31,500
Storage Room 800 S.F.	April 11, 1986 #04262	April 14, 1986		\$2,000	\$2,000
Boris Color Lab 1st Floor 2,100 S.F.	June 27, 1986 #5067	July 7, 1986	May 7, 1987	\$75,000	\$75,000
Boris Color Lab 7th Floor 27,000 S.F.	June 24, 1986 #5066	July 1, 1986	May 7, 1987	\$1,242,000*	\$1,242,000*
Russ Britt Bth Floor 2,400 S.F.	Sept. 11, 1986 #0782	Sept. 15, 1986	Nov. 24, 1986 Date C.O. could be filed 5/9/87	\$72,000	\$72,000
Furniture Marketing Showroom Bth Floor 6,000 S.F.	Sept. 19, 1986 #0780	Sept. 22, 1986	Jan. 15, 1987 Date C.O. could be filed 5/9/87	\$180,000	\$180,000
Grohe Studio Bth Floor 2,700 S.F.	Sept. 19, 1986 #0938	Sept. 22, 1986	Feb. 13, 1987 Date C.O. could be filed 5/9/87	\$91,000	\$91,000
ARA Art Bth Floor 5,000 S.F.	Sept. 19, 1986 #0937	Nov. 12, 1986	June 1, 1987	\$150,000	—
Nathan Tyler Bth Floor 3,000 S.F.	Dec. 10, 1986 #1969	Dec. 10, 1986	March 3, 1987 Date C.O. could be filed 5/9/87	\$95,000	\$95,000
				\$1,926,000	

*Estimated cost on "Application
for permit for alteration and repairs",
No. 5066.

Exhogen
8th Floor
2,300 S.F.

Feb. 20, 1987
#2753

Feb. 22, 1987

June 29, 1987

\$79,000

Rakebrant
8th Floor
2,200 S.F.

March 6, 1987
#2754

March 9, 1987

May 8, 1987

\$71,000

\$71,000

\$ 150,000

\$ 2,076,000

Occupancy Change	May 13, 1986
	#4296
451 D Renovate building	June 26, 1986
	#5065
9th Floor Common Area	Feb. 11, 1987
	#2059
6th Floor Common Area	Feb. 11, 1987
	#2058

	July 1, 1986
	Feb. 16, 1987
	Feb. 16, 1987

	Year 1990
	Nov. 87
	Nov. 87

	\$2,875,250
	\$123,000
	\$115,000

\$ 3,113,250
2,076,000
\$ 5,189,250

Total Tenant Renovation

[Sub-Totals and Total Added]

[Signature]
 Mayor
 City Council

John F. Hall, Chief Council Counsel
 David Barry, Assistant Lead Council
 John Byrne, Mayor

BOSTON
REDEVELOPMENT
AUTHORITY

Attachment No. 4

Raymond L. Flynn

Stephen Coyle

One City Hall Square
Boston, MA 02201
617-722-1000

June 5, 1987

Delivery by Hand

Bernard F. Shadrawy, Jr., Esq.
Shadrawy & Rabinovitz
15 Broad Street
Boston, Massachusetts 02109-3803

Re: 451 D Street, South Boston

Dear Mr. Shadrawy:

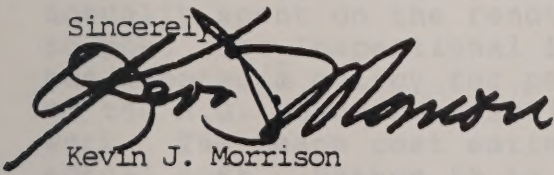
This letter is to confirm our agreement in connection with the pending determination by the City's Zoning Board of Appeal ("BZA") as to whether a variance for off-street parking is required for the above-captioned project and further whether the same qualifies as a Development Impact Project ("DIP"). A Board Memorandum was prepared by staff for submission to the Authority's Board at its meeting on May 21st. Prior to the May 21st Board meeting, you requested time to submit further documentary evidence. We agreed to withdraw the Board Memorandum based upon your agreement to defer the matter before BZA for at least thirty days. The Board Memorandum was withdrawn and the BZA on May 26th granted a deferral on this matter to its meeting on July 7th.

In order to make appropriate recommendations to the Authority's Board, it is requested that you submit the documentary evidence not later than Friday, June 12th, to give staff sufficient time to review the same.

Enclosed for your files is a copy of the May 21st Board Memorandum which was withdrawn. Staff recommendations will be submitted to the Authority's Board at its meeting on June 18th, June 25th or July 2nd. Three alternate dates are given because the specific meeting schedule has not been determined.

If you have any questions or want to schedule a meeting, do not hesitate to call me at 722-4300, Ext. 336.

Sincerely,



Kevin J. Morrison
Deputy General Counsel

KJM/DLM

Enclosure: a/s

cc: Robert F. McNeil, Chief General Counsel
Daniel Barry, Assistant Land Use Counsel
Brian Byrnes, Planner



SHADRAWY & RABINOVITZ

A PROFESSIONAL ASSOCIATION
OF
ATTORNEYS AT LAW

BERNARD F. SHADRAWY, P.C.
BERNARD F. SHADRAWY, JR., P.C.
EDWARD RABINOVITZ
ROBERT E. BROOKS

15 BROAD STREET
BOSTON, MASSACHUSETTS 02109-3803

(617) 523-3333

June 15, 1987

BY MESSENGER

Kevin J. Morrison
Deputy General Counsel
Boston Redevelopment Authority
One City Hall Square
Boston, MA 02201

RECEIVED

JUN 15 1987

BRA GENERAL COUNSEL OFFICE

4:30 p.m.

Re: 451 D Street, South Boston

Dear Mr. Morrison:

Enclosed please find a chart and summary sheet which sets forth the amounts that have been spent for renovation and repair work on 451 D Street, South Boston. The chart and summary sheet sets forth the area of the building involved, the date the work was started, the date work completed, the estimated cost of the work on the permit, the total actual cost of the work performed to date and the actual cost of rehab work performed. The amounts of the actual cost of work are based on receipts and invoices.

The charts break down the work into various categories including owner improvements, tenant buildouts, repair work as a result of fire damage and work performed solely to meet fire and safety standards. We contend that the cost of damage repairs, tenant buildouts and the installation of safety systems should not be included in the calculation of 50% of the assessed value to determine if the building is being substantially renovated.

I would like to take this opportunity to provide you with the explanation of the variance between the permit amount and the amount actually spent on the renovations as had been previously submitted to you. The Inspectional Services Department of the City of Boston has adopted a policy for permit applications that requires the use of the R.G. Means Cost Estimator of \$30.00 per foot for renovation work. The Means cost estimator is not an accurate measurement of actual cost. Rather it is a nationwide estimator that does not represent costs in the Boston area and is definitely not an indicator of the prices that a developer of the magnitude of Hamilton Realty can command. It is also the policy of the department to require certification of the original estimates for the purpose of obtaining a Certificate of Occupancy.

Hamilton Realty, in compliance with this policy, as well as because of historical difficulties in navigating through the permitting process, has established a policy whereby the R.G. Means estimator is always used and when in doubt about the amount, to overestimate the projected cost. This policy avoids any delays or questions with the issuance of permits. It is for this reason that in almost every case the actual cost of work performed is significantly less than the estimated cost as shown on the permit.

In order to substantiate the actual costs, I will provide you if necessary with invoices and canceled checks which will verify the amounts actually expended. I believe it would be more productive to sit with you to review this information, rather than hand to you a stack of papers. I am also prepared to provide for you evidence of the historical square foot cost associated with renovations as performed by the owner which will indicate a cost of \$15.00 to \$20.00 per square foot, which is substantially below the Means cost estimate which is utilized by the Inspectional Services Department.

Based on these charts and the above explanation, the total amount spent for work directly related to renovation or rehabilitation and controlled by the landlord is \$1,961,642 or \$4.32 per square foot.

Even under a situation most favorable to the BRA's position which would include all money spent, tenant buildouts, work in progress, safety items and damage repair, the total cost is \$3,700,576 or \$8.15 per square foot.

The property was acquired by the current owner in 1983. Prior to March of 1986 there were various and sundry improvements, repairs and changes performed on the building by the current owner and previous owners. It is assumed and also very likely that more work will be performed in the future (example-two permits have been issued for pending work to be performed). These items have not been included in any calculations and as argued below, should not be included under Article 26, as only a twelve month period is at issue.

I would also like to take this opportunity to restate my position on the applicability of Article 26 or 26A to this project. You state in your memorandum of May 21, 1987 that Article 26A supersedes Article 26 and therefore there is no 12 month limit to amounts spent on rehabilitation. Yet Section 26A, 3-4 states that "Article 26A supplements and does not repeal Article 26". If 26A applies to the project, which we do not believe is so, then the lack of a time definition during which the work would be completed,

creates a situation in which a developer would never be able to determine whether or not he was subject to the Article. For example, if a developer expended 45% of the assessed value in one year and then expended 5% more 3 years later, would that subject his project to DIP? In that hypothetical, which assessment would be used, the current January 1 or January 1, three years hence.

It is our position that the definition of "substantially rehabilitate" contained in Article 26A is ambiguous and would be nullified by a court on that basis.

In the alternative, if Article 26 is applicable, then the owner has not expended costs in excess of 50% of the assessment during any 12 months as set forth in the enclosed chart.

On a point of clarification, I would direct your attention to M.G.L.A. c. 59. In Massachusetts the date January 1 is the taxing date for the following fiscal year. Thus, January 1, 1986 is the taxing date for fiscal 1987 when the assessment for the property was \$7,925,500.

Reiterating our position, we do not believe that the linkage law applies to 451 D Street. If arguendo the project did fall within the scope of the Article, then factually, based on actual costs, the project does not meet the 50% of assessed value criteria to qualify as a substantial rehabilitation. The assessed value of the property for FY 1987 is \$7,923,500. To be included the costs would need to total \$3,961,750, and as stated above and as shown on the attached chart this building is clearly below the amounts required for Article 26.

We also still believe that we do not need to seek a variance for parking under Article 23-7A, and if the Board of Appeal does not agree with our interpretation, we will be forced to take an appeal on this issue to the appropriate court.

For this reason as well as the other arguments advanced in this letter and in previous letters and memoranda, I urge you to reconsider your recommendation to include this building as a Development Impact Project. The BRA decision on this matter will directly impact on any rehabilitation work by this owner and most likely the owners of other buildings of over 100,000 square feet.

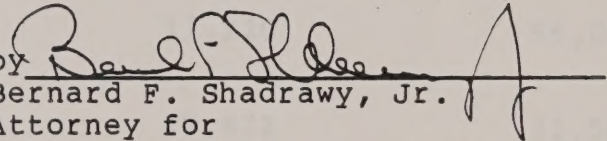
I will await your review of this letter and attachment and if you feel it necessary I will be available to review with you the documentation for the actual costs, as well as the historical per

square footage cost of rehab work as completed by my client. I would also request that you inform me as to when the Board meeting will be held to review the enclosed as I would want to attend and possibly speak.

I will await your call.

Very truly yours,

SHADRAWY & RABINOVITZ

by 
Bernard F. Shadrawy, Jr.
Attorney for
451 D Street Ltd. Partnership

BFSJr/a
enclosures

SUMMARY SHEET

451 D STREETOWNER

<u>Permitted Work</u>	<u>Est. App. Amount</u>	<u>Est. Total Actual Cost</u>	<u>Actual Cost Work Completed</u>	<u>Actual Cost o Rehab Work</u>
Core & 8th Floor Common area	\$2,875,250	\$1,899,200	\$1,082,544	\$1,273,134 *
6th Floor Common areas	115,000	56,000	17,920	56,000 **
9th Floor Common areas	123,000	32,508	27,632	32,508 **
Common Area & Elevator	<u>600,000</u>	<u>600,000</u>	<u>81,781</u>	<u>600,000</u>
	\$3,713,250	\$2,587,708	\$1,209,877	\$1,961,642

TENANT

Various Spaces	\$1,464,000	\$1,112,868	\$1,112,868	<u>\$1,112,868</u>
				\$3,074,510

Items not to be included as rehabilitation to building

* excludes \$626,066 for fire and safety equipment and installation.

** work commenced but not completed within the twelve month period.

TENANT SPACE & SQUARE FOOTAGE	DATE PERMIT ISSUED PERMIT #	DATE WORK STARTED	DATE WORK COMPLETED	TENANT BUILDOUTS	
				EST. COST OF WORK	ACTUAL COST OF WORK
Allen Copy (tenant moved) 6,000 S.F.	Feb. 18, 1986 #3484	Feb. 19, 1986	April 1, 1986	\$78,000	\$78,000
Allen Copy Amendment	March 24, 1986 #A363	March 25, 1986	April 1, 1986	\$31,500	\$31,500
Storage Room 800 S.F.	April 11, 1986 #04262	April 14, 1986		\$3,000	\$3,000
Boris Color Lab 1st Floor 2,100 S.F.	June 27, 1986 #5067	July 7, 1986	May 7, 1987	\$75,000	\$638,421 Total Tenant paying for buildout
Boris Color Lab 7th Floor 27,000 S.F.	June 24, 1986 #5066	July 1, 1986	May 7, 1987	\$610,000	
Russ Britt 8th Floor 2,400 S.F.	Sept. 11, 1986 #0782	Sept. 15, 1986	Nov. 24, 1986 Date C.O. could be filed 5/9/87	\$72,000	\$45,813
Furniture Marketing Showroom 8th Floor 6,000 S.F.	Sept. 19, 1986 #0980	Sept. 22, 1986	Jan. 15, 1987 Date C.O. could be filed 5/9/87	\$180,000	\$96,773
Grohe Studio 8th Floor 2,700 S.F.	Sept. 19, 1986 #0938	Sept. 22, 1986	Feb. 13, 1987 Date C.O. could be filed 5/9/87	\$91,000	\$67,034
AAA Art 8th Floor 5,000 S.F.	Sept. 19, 1986 #0937	Nov. 12, 1986	May 27, 1987	\$150,000	\$83,909
Nathan Tyler 8th Floor 3,000 S.F.	Dec. 10, 1986 #1989	Dec. 10, 1986	March 3, 1987 Date C.O. could be filed 5/9/87	\$95,000	\$62,031

Endogen
8th Floor
2,500 S.F.

Feb. 20, 1987
#2753

Feb. 22, 1987

May 27, 1987

\$79,000

\$42,904

Aurora Photo Group
8th Floor
2,200 S.F.

March 6, 1987
#2754

March 9, 1987

May 8, 1987

\$71,000

\$34,983

\$1,464,000

\$1,112,866

Occupancy Change
 451 D Renovate
 building
 9th floor
 Common Area
 6th floor
 Common Area
 Common Area
 Elevator

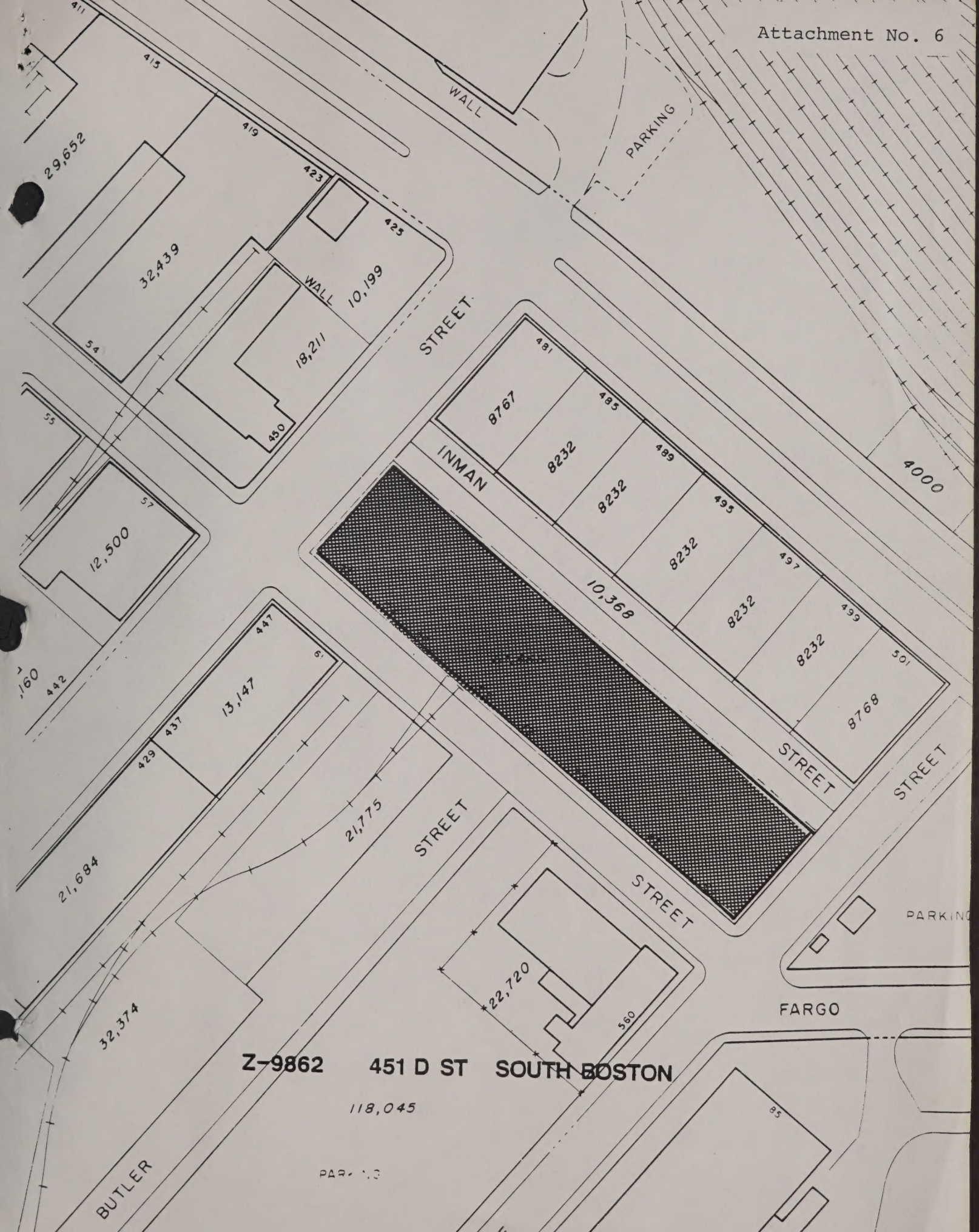
May 13, 1986
 #4296
 June 26, 1986
 #5085
 Feb. 11, 1987
 #2059
 Feb. 11, 1987
 #2058
 pending

July 1, 1986
 Feb. 16, 1987
 Feb. 16, 1987

451 D STREET RENOVATION WORK
 Year 1988
 Nov. 87
 Nov. 87
 ?

COMMON AREAS

Actual Cost		
\$2,075,250	57% Complete Cost \$1,082,544	\$1,899,200
\$123,000	85% Complete Cost \$27,632	32,508
\$115,000	32% Complete \$17,920	56,000
\$600,000	est. \$600,000	600,000
\$3,713,250	\$1,728,096	\$2,587,708



Z-9862 451 D ST SOUTH BOSTON

118,045

PAR 1.3